SUP. CT. U.S.
FILED

No. 09-385

IN THE
Supreme Court of the United States

BAKERY MACHINERY & FABRICATION, INC.,

Petitioner,

v.

TRADITIONAL BAKING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented a compelling reason to grant the Petition, in light of Petitioner's failure to preserve the issue that its attorney's conduct served as a basis for relief under Fed. R. Civ. P. 60(b)(6), where Petitioner's motion to vacate the default judgment focused solely upon whether the conduct precipitating Petitioner's default constituted "excusable neglect" under Fed. R. Civ. P. 60(b)(1), Petitioner never requested the District Court to consider whether such conduct constituted the type of "extraordinary circumstances" which justify relief under Rule 60(b)(6), and the District Court's detailed ruling was therefore limited to the fact that this case did not present an instance of "excusable neglect" under Rule 60(b)(1).

II. Whether Petitioner has presented a compelling reason to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's denial of the Motion to Vacate Default Judgment is consistent with the prior decisions of this Court regarding Fed. R. Civ. P. 60(b)(6) and the extent to which a client is responsible for the conduct of its attorney, and where Petitioner does not claim that the District Court abused its discretion or that the Seventh Circuit's ruling conflicts with any decision of this Court or another Circuit Court of Appeals, or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Traditional Baking, Inc. is a California corporation. There is no parent corporation. No publicly held company owns 10% or more of Traditional Baking, Inc.'s stock.

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STATEMENT OF THE CASE

The Petition for Writ of *Certiorari* omits several pertinent facts that are crucial to a full understanding of what occurred, and what did not occur, before the District Court in this case. Accordingly, Respondent submits this complete Statement of the Case for the Court's review and consideration.

This matter arises from Bakery Machinery & Fabrication, Inc.'s failure to perform its contractual obligations to manufacture and deliver to Traditional Baking Inc. a new oven within six months from the date the oven was ordered (R. Doc. 20, pp. 1-2). Bakery Machinery & Fabrication, alleging that Traditional Baking failed to live up to its duties under the contract, filed suit first in the Circuit Court for LaSalle County, Illinois (R. Doc. 1, p. 1).

Traditional Baking properly removed the action to the United States District Court for the Northern District of Illinois (R. Doc. 1, p. 1). After Traditional Baking filed its Answer and Counterclaim–premised upon Bakery Machinery & Fabrication's failure to deliver the oven in six months–the District Court promptly entered a scheduling order that required the parties to make disclosures required under Fed. R. Civ. P. 26(a)(1) by January 10, 2007 and set a fact discovery cut-off of May 31, 2007 (R. Doc. 13, p. 1). The District Court further ordered any amended pleadings to be filed on or before February 28, 2007, and that responsive pleadings thereto be filed by March 14, 2007 (R. Doc. 19). Although Bakery Machinery & Fabrication served an Amended Complaint upon Traditional Baking, which

Traditional Baking answered on March 2, 2007 (R. Doc. 21), the Amended Complaint was never actually filed by Bakery Machinery & Fabrication.

On February 28, 2007, Traditional Baking filed an Amended Counterclaim (R. Doc. 20). On March 14, 2007, Bakery Machinery & Fabrication served an Answer to Traditional Baking's original Counterclaim, which had been superseded by the Amended Counterclaim filed on February 28 (R. Doc. 26, p. 2).

On March 15, 2007, counsel for Traditional Baking called counsel for Bakery Machinery & Fabrication to inform him that the Answer to the original Counterclaim was insufficient, at which time counsel for Bakery Machinery & Fabrication claimed not to have seen the Amended Counterclaim (R. Doc. 26, pp. 3, 45). Although a copy of the Amended Counterclaim had been emailed to Bakery Machinery & Fabrication's counsel on March 2, 2007, counsel for Traditional Baking forwarded another copy of the Amended Counterclaim via correspondence also dated March 15, 2007 (*Id.*). Bakery Machinery & Fabrication's counsel promised to try to file a responsive pleading to the Amended Counterclaim on or before the next court date scheduled for March 27, 2007 (R. Doc. 26, p. 45).

By March 27, 2007, Bakery Machinery & Fabrication still had not filed an answer to the Amended Counterclaim, and the District Court issued another Order directing Bakery Machinery & Fabrication to respond to the Amended Counterclaim by April 2, 2007 (R. Doc. 26, p. 48). Bakery Machinery & Fabrication again failed to respond by the date set by the District

Court. Accordingly, on April 4, 2007, Traditional Baking moved to default Bakery Machinery & Fabrication for its failure to respond to the Amended Counterclaim as ordered by the District Court (R. Doc. 26). Contemporaneously, Traditional Baking also moved, pursuant to Fed. R. Civ. P. 37(b)(2), to compel Bakery Machinery & Fabrication to serve its Rule 26(a)(1) disclosures, which were due on January 10, 2007, and requested sanctions (R. Doc. 24).

On April 17, 2007, the District Court granted Traditional Baking 's motion to compel, and continued that portion of the motion seeking sanctions against Bakery Machinery & Fabrication for the latter's repeated failure to comply with the Federal Rules of Civil Procedure and the prior orders concerning discovery and filing of pleadings (R. Doc. 28). The District Court also denied, *without prejudice*, Traditional Baking's Motion for Default, as Bakery Machinery & Fabrication filed its Answer to the Amended Counterclaim on April 17th (R. Doc. 28, 29).

Ultimately, on June 25, 2007, the Court granted Traditional Baking 's motion for sanctions and ordered Bakery Machinery & Fabrication to pay Traditional Baking sanctions in the amount of $1375 by August 31, 2007 (R. Doc. 37). Thereafter, on July 30, 2007, Traditional Baking served upon Bakery Machinery & Fabrication a 73-paragraph request for admission of facts and the genuineness of documents pursuant to Fed. R. Civ. P. 36 (R. Doc. 45). Bakery Machinery & Fabrication never served a response to those requests for admission (R. Doc. 86, pp. 8-9).

On September 6, 2007, Traditional Baking filed its Motion to Strike Pleadings, Enter Default, and for Additional Sanctions against Bakery Machinery & Fabrication (R. Doc. 47). The motion was again filed pursuant to Fed. R. Civ. P. 37(b)(2), and based upon Bakery Machinery & Fabrication's repeated refusal to abide by the Federal Rules of Civil Procedure, the Local Rules of the Northern District of Illinois, and numerous orders of the District Court, including the payment of sanctions ordered on June 25, 2007 (R. Doc. 47, p.2). Traditional Baking also renewed its previously filed Motion for Default, and requested additional sanctions based upon Bakery Machinery & Fabrication's conduct, including its failure to send a party representative to a settlement conference before the magistrate judge (*Id.*, pp. 2-3).

Following a hearing and the filing of Bakery Machinery & Fabrication's written response to Traditional Baking's Motion to Strike Pleadings, the District Court entered an order on September 24, 2007 directing Bakery Machinery & Fabrication and its attorney to take several affirmative steps before October 25, 2007, lest all of its pleadings be stricken without leave to refile (R. Doc. 50, p. 3). Specifically, the Court ordered: (1) Bakery Machinery & Fabrication's attorney to file an appearance; (2) Bakery Machinery & Fabrication's attorney to pay a sanction of $50 to the Clerk of the Court for having failed to file an appearance; (3) Bakery Machinery & Fabrication to pay the sanction ordered on June 25, 2007; and (4) Bakery Machinery & Fabrication's attorney to demonstrate that he had registered as an electronic filer or show cause why he was prevented from doing so (*Id.*). The Court then

continued Traditional Baking's Motion for Entry of Default until October 25, 2007 (*Id.*).

Despite the District Court's repeated warnings, counsel for Bakery Machinery & Fabrication failed to appear at the hearing on October 25, 2007 (R. Doc. 59). Further, Bakery Machinery & Fabrication had not complied with any aspect of the Court's order of September 24, 2007 (R. Doc. 89, p. 1). Accordingly, the District Court entered an order striking all of Bakery Machinery & Fabrication's pleadings without leave to refile and granting Traditional Baking's motion for default in its favor on its Amended Counterclaim (R. Doc. 59). The District Court also set the case for a bench trial on the only remaining issue, namely, Traditional Baking's claim for damages under its Amended Counterclaim (*Id*.).

On November 7, 2007, Traditional Baking moved for entry of default judgment against Bakery Machinery & Fabrication based on the verification of its damages as set forth in the affidavits of Traditional Baking's president and its previously-disclosed expert witness (R. Doc. 61, pp. 11, 74). On November 20, 2007, the District Court granted the motion and entered judgment in favor of Traditional Baking in the amount of $582,000 (R. Doc. 65). Also on November 20, 2007, counsel for Bakery Machinery & Fabrication appeared and sought to be heard on the Motion for Default Judgment (*Id.*). After ascertaining that counsel *still* had not complied with any portion of the September 24, 2007 order, the District Court ordered Bakery Machinery & Fabrication's counsel to file his appearance with and pay the fine to the clerk of court as previously ordered

(R. Doc. 66). Counsel for Bakery Machinery & Fabrication also filed on that date an objection and motion to vacate the order of October 25, 2007 (R. Doc. 67); however, because Bakery Machinery & Fabrication failed to provide notice to Traditional Baking of its motion, the Court struck the objection/motion to vacate without prejudice (R. Doc. 65).

On December 14, 2007, Bakery Machinery & Fabrication filed a "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award" (R. Doc. 70). In that motion, Bakery Machinery & Fabrication cited *no* statutory or case authority in support of its argument that the November 20, 2007 order should be vacated (R. Doc. 70). On December 18, 2007, the District Court entered an order directing Traditional Baking to file its response to this motion on or before January 4, 2008 and Bakery Machinery & Fabrication to file its reply on or before January 11, 2008. Traditional Baking complied with the Court's order and filed a timely response on January 4, 2008. (R. Doc. 73). In that response, Traditional Baking pointed out that Fed. R. Civ. P. 60(b) governed the vacation of judgments (R. Doc. 73, p. 5). Bakery Machinery & Fabrication failed to reply before the Court's January 11, 2008 deadline.

On January 30, 2008, Bakery Machinery & Fabrication filed a Motion to Substitute Counsel and Temporarily Stay All Proceedings (R. Doc. 76). The motion was supported by an affidavit from the President of Bakery Machinery & Fabrication, in which he claimed that every time he asked his counsel about the litigation over the previous nine months, he was informed that the litigation was going well (R. Doc. 76-4, p.2). Bakery

Machinery & Fabrication's President also stated that he first learned of the default judgment on January 23, 2008 (*Id.*). The District Court granted the motion and stayed the matter until February 19, 2008 (R. Doc. 78).

On February 19, 2008, Bakery Machinery & Fabrication filed a "Motion for Leave to File Reply *Instanter*," wherein Bakery Machinery & Fabrication sought leave to file a reply brief in support of its motion to vacate raising new arguments relating to the conduct of Bakery Machinery & Fabrication's prior counsel as a basis for the District Court to grant the motion (R. Doc. 82, 86). In its proposed reply brief, Bakery Machinery & Fabrication once again offered the affidavit from its President, which was filed in connection with the motion to substitute, as support for the motion to vacate (R. Doc. 86-3). Bakery Machinery & Fabrication requested not only that the default judgment be vacated, but that it be permitted to file untimely responses to Traditional Baking's outstanding requests to admit facts (R. Doc. 86, pp. 8-9). Traditional Baking objected to the motion for leave to file, since the proposed reply brief was untimely and improperly argued new facts that did not appear in the original motion to vacate (R. Doc. 84). The District Court granted Bakery Machinery & Fabrication leave to file its reply brief, but indicated that it would "disregard facts and argument not appropriate for a reply memorandum" (R. Doc. 85).

The District Court denied Bakery Machinery & Fabrication's motion to vacate on April 15, 2008, finding that the conduct of Bakery Machinery & Fabrication's counsel which led to the entry of the default judgment

was willful and properly attributable to Plaintiff (R. Doc. 89, p.2). In its decision, the District Court noted that "[b]oth parties recognize that Federal Rule of Civil Procedure 60(b)(1) governs this motion," and made no mention of Rule 60(b)(6) (*Id.*).

Despite the fact that the District Court never considered whether relief may have been appropriate pursuant to Rule 60(b)(6), Bakery Machinery & Fabrication and its new counsel did not file a motion pursuant to Fed. R. Civ. P. 59(e) to challenge the District Court's Rule 60(b) ruling. Instead, Bakery Machinery & Fabrication appealed the District Court's April 15, 2008 ruling to the United States Court of Appeals for the Seventh Circuit (R. Doc. 90). Before the Seventh Circuit, Bakery Machinery & Fabrication conceded that the District Court did not abuse its discretion when it determined that relief under Rule 60(b)(1) was not available. (Brief of Appellant at 12). Nevertheless, Bakery Machinery & Fabrication argued, for the first time on appeal, that it was entitled to relief under Rule 60(b)(6), based upon the allegations of its President that Bakery Machinery & Fabrication had been diligent in its conduct of the litigation and had been deceived by its prior counsel (*Id.*).

In its Opinion, the Seventh Circuit acknowledged Bakery Machinery & Fabrication's *argument* that it had been a diligent litigant deceived by its counsel, but made no such findings (Pet. App., A-7-8). The Seventh Circuit determined, however, that notwithstanding Bakery Machinery & Fabrication's "purported diligence," the conduct of its attorney did not rise to the level of extraordinary circumstances which justified relief under

Rule 60(b)(6). (*Id.*, A-8). The Seventh Circuit determined that the District Court did not abuse its discretion in denying Petitioner's motion to vacate, and affirmed the District Court's April 15, 2008 Order. (*Id.*, A-9).

SUMMARY OF ARGUMENT

Petitioner has presented no "compelling reasons" for its Petition for a Writ of *Certiorari* to be granted. Sup. Ct. R. 10. As an initial matter, Petitioner does not even assert that the District Court abused its discretion when it failed to grant the motion to vacate the default judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Indeed, Petitioner cannot assert that such an abuse of discretion occurred, because Bakery Machinery & Fabrication never asked the District Court to consider whether relief from the judgment was appropriate pursuant to Rule 60(b)(6). Furthermore, even if the Petitioner could identify an erroneous factual finding or the misapplication of a properly stated rule of law, such reasons would not suffice to support the granting of the Petition. Sup. Ct. R. 10. Most importantly, however, the Seventh Circuit's Opinion affirming the District Court is consistent with, and indeed relied upon, the well-established precedent of this Court that a client is bound by the acts or omissions of its freely selected lawyer-agent.

Despite its exaggerated assertion that the Seventh Circuit's Opinion will punish litigants "before every appellate circuit and every District Court," Petitioner nowhere contends that the Seventh Circuit's Opinion conflicts with any decision of this Court or of another United States Circuit Court of Appeals on the same

important matter, or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Petitioner has simply failed to satisfy its burden of demonstrating any compelling reason for the Petition to be granted.

ARGUMENT

I.

THE DISTRICT COURT'S DENIAL OF THE MOTION TO VACATE IS REVIEWED FOR AN ABUSE OF DISCRETION.

A motion for relief from judgment under Rule 60(b) is entrusted to the considerable discretion of the District Court. *Browder v. Dir., Dept. of Corrections*, 434 U.S. 257, 263 (1978). Accordingly, a District Court's 60(b) ruling is subject to only limited and deferential appellate review: whether the ruling constituted an abuse of that discretion. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Such an abuse of discretion occurs "only when *no* reasonable person could agree with the district court; there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's action." (Pet. App. A-6, quoting *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989)). As noted by the Seventh Circuit, a district court ruling upon a Rule 60(b) motion enjoys "discretion piled upon discretion." (Pet. App. A-7, quoting *Swaim v. Molton Co.*, 73 F.3d 711, 722 (7th Cir. 1996)). Given this deferential standard of review, even if this Court might have ruled upon Petitioner's Rule 60(b) motion differently, it does not follow that the

District Court abused its discretion here. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)(affirming dismissal with prejudice entered as a sanction under Fed. R. Civ. P. 37).

Further, Petitioner is charged with establishing a compelling reason to grant the Petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner's attempt to meet its burden reduces to its bare assertion that "[j]ustice has not yet been done in this case." (Pet. at 18). In point of fact, justice *was* done in this case. As noted by this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 n.10 (1962), to resurrect litigation against the defendant so as not to penalize the plaintiff for the errors and omissions of its counsel would be to unjustly visit the sins of the plaintiff's attorney upon the defendant.

Further, as this Court has previously stated, the writ of *certiorari* should not be granted except in cases involving principles of public importance and where there is a real conflict of opinion and authority between the various circuit courts of appeal. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955), quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioner fails to cite any compelling reason why this Court should grant the Petition. Rather, this case is one of many unremarkable decisions in which the District Court exercised its substantial discretion to deny a Rule 60(b) motion predicated upon inexcusable neglect. Accordingly, the Petition should be denied.

II.

PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, WHERE PETITIONER NEVER ASKED THE DISTRICT COURT TO CONSIDER WHETHER RELIEF UNDER RULE 60(b)(6) WAS APPROPRIATE IN THIS CASE, AND THEREFORE FORFEITED THE ISSUE.

In its Petition, Bakery Machinery & Fabrication contends that the Seventh Circuit "effectively read [Rule 60(b)(6)] out of existence" when it determined that the District Court did not abuse its discretion by denying Petitioner's Rule 60(b) motion. Hyperbole aside, Petitioner elides the fact *that it never requested the District Court to grant relief under Rule 60(b)(6).* Petitioner failed to raise its Rule 60(b)(6) argument in either its "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award," filed by its original attorney Mr. Hinterlong, or in its untimely reply brief in support of that motion filed by its present counsel. Further, even after the District Court denied the motion to vacate solely upon the basis of Rule 60(b)(1), Petitioner and its present counsel never sought to present any Rule 60(b)(6) argument to the District Court by means of a motion to alter or amend judgment pursuant to Rule 59(e). Accordingly, Bakery Machinery & Fabrication forfeited its Rule 60(b)(6) argument by failing to raise it before the District Court. *Swaim v. Moltan Co.*, 73 F.3d 711, 716 (7th Cir. 1996)(on appeal from default judgment and denial of 60(b) motion to vacate same, defendant forfeited opportunity to contest district

court's jurisdiction by failing to raise argument in its 60(b) motion). In light of this forfeiture–by its present counsel–Petitioner has not presented a compelling reason for this Court to grant the writ of *certiorari*.

In general, a federal appellate court does not consider an issue that was not ruled upon in the District Court. *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 2618 (2008), quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Although the matter is left primarily to the discretion of the various courts of appeals, this Court has noted the danger that injustice may just as often be caused rather than avoided by deciding certain issues without affording the opposing party a chance to respond or the district court an opportunity to otherwise focus the issues. *Singleton*, 428 U.S. at 121. In the present case, the Seventh Circuit should not even have considered Petitioner's Rule 60(b)(6) argument, since the District Court never determined whether "extraordinary circumstances" existed to justify relief under 60(b)(6) and was never asked to do so.

In its opening "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award," Petitioner cited *no* statutory or case authority in support of its argument that the November 20, 2007 order should be vacated (R. Doc. 70). Actually, Traditional Baking, in its response to that motion, pointed out that Rule 60(b) governed the vacation of judgments (R. Doc. 73, p. 5). Thereafter, when Petitioner's current counsel appeared and filed its reply brief, Petitioner blithely cited to Rule 60(b) in its entirety, along with a single case, *A.F. Dorfmeyer, Co. v. M.J. Sales & Distributing Co.*, 461 F.2d 40, 43 (7th Cir.

1972), a case which dealt solely with Rule 60(b)(1). (R. Doc. 86, p.6).

In its reply brief, Petitioner argued before the District Court that it was entitled to relief under Rule 60(b)(1) because its chosen counsel, Mr. Hinterlong, engaged in willful misconduct by repeatedly violating the Federal Rules of Civil Procedure, the Local Rules of the Northern District of Illinois, and numerous orders of the district court, all the while lulling Bakery Machinery & Fabrication into a false sense of security that the litigation was going smoothly. Petitioner further argued that this sanction was too harsh, and that it should not suffer for the conduct of its attorney. Unsurprisingly, in its ruling the District Court noted only that Rule 60(b)(1) governed the motion (Pet. App., A-13). Further, the District Court flatly rejected Petitioner's argument, pointing out that "a party who chooses his counsel freely must be bound by his counsel's action" and that "more culpable conduct by the attorney has mortal consequences for the client's case." (Pet. App., A-16, quoting *Johnson v. Gudmundsson*, 35 F.3d 1104 (7th Cir. 1994)).

Once the District Court denied the motion to vacate on April 15, 2008, Petitioner (and its new counsel) had ten days to file a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). By that motion, Petitioner arguably could have raised its Rule 60(b)(6) argument and asked the District Court to exercise its discretion and consider whether Petitioner's purported diligence and the alleged wilful misconduct of its attorney constituted exceptional circumstances justifying the extraordinary relief available under Rule

60(b)(6). *Inryco, Inc. v. Metropolitan Engineering Co., Inc.*, 708 F.2d 1225, 1233 (7th Cir. 1983)(holding that a subsequent Rule 59(e) motion preserved a Rule 60(b)(6) argument, despite the fact that Rule 60(b)(6) was never cited or argued in the original motion).[1] Petitioner made a calculated, deliberate decision not to file such a motion, however, and instead appealed to the Seventh Circuit. By failing to raise its Rule 60(b)(6) claims in either its motion to vacate or a subsequent Rule 59(e) motion to alter or amend judgment, Petitioner forfeited its claims to relief under Rule 60(b)(6). See *KPS & Assoc., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 16-17 (1st Cir. 2003) (rejecting argument that attorney's gross negligence should not be imputed to client, but especially where plaintiff first raised theory that Rule 60(b)(6) relief was appropriate on appeal).

Before the Seventh Circuit, Petitioner itself conceded that the District Court's ruling was correct under Rule 60(b)(1), because Mr. Hinterlong's conduct was "indefensible." Brief of Appellant at 12. Nevertheless, Petitioner urged the Seventh Circuit to find that the District Court abused its discretion when it denied the motion to vacate since it failed to consider

1. In *Inryco*, the defendant only argued it was entitled to relief under Rule 60(b)(1), although it cited Rule 60(b)(6) in its memorandum in support of its motion to vacate. Here, by contrast, Petitioner merely cited to Rule 60(b) generally, and cited caselaw considering Rule 60(b)(1) only, and these arguments were not raised until Petitioner's untimely reply brief (R. Doc. 86, pp. 5-6). Further, the District Court stated that it would not consider facts or arguments raised for the first time in the reply (R. Doc. 85). As such, even under *Inryco*, Petitioner may have forfeited its right to raise new claims in a Rule 59(e) motion.

whether relief was appropriate under Rule 60(b)(6). *Id.* Of course, the District Court could not have abused its discretion in denying Rule 60(b)(6) relief, because Petitioner never asked it to exercise any discretion under that subsection. *Swaim v. Moltan Co.*, 73 F.3d 711, 717 (7th Cir. 1996)(on appeal from default judgment and denial of 60(b) motion to vacate same, defendant forfeited opportunity to contest district court's jurisdiction by failing to raise argument in its 60(b) motion). Moreover, the District Court had an additional reason not to consider Rule 60(b)(6) when Petitioner only argued that Rule 60(b)(1) relief was appropriate: several decisions of this Court have suggested that relief under subsection (6) is mutually exclusive from that offered under subsection (1) of Rule 60(b). *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 393 (1993), citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 857, 863 and n.11 (1988).

Petitioner now requests this Court to grant *certiorari* and reverse the Seventh Circuit's Opinion, which held that the District Court did not abuse its discretion in denying Petitioner's motion to vacate. Yet, tellingly, Petitioner fails to argue that the District Court abused its discretion. Presumably, Petitioner's reticence in this regard stems from its knowledge that it never requested the District Court to exercise that discretion and consider whether relief from the default judgment was appropriate under Rule 60(b)(6). In addition, Petitioner previously conceded that the District Court was correct in determining that Rule 60(b)(1) did not apply. Petitioner cannot present any compelling reason for this Court to grant *certiorari*, where Petitioner

cannot even bring itself to argue that the District Court abused its considerable discretion. Accordingly, Bakery Machinery & Fabrication's Petition for Writ of *Certiorari* should be denied for this reason alone.

III.

PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, WHERE THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS HOLDING THAT CLIENTS MUST BE HELD ACCOUNTABLE FOR THE ACTS AND OMISSIONS OF THEIR ATTORNEYS.

In its Opinion affirming the District Court's denial of Petitioner's Rule 60(b) motion, the Seventh Circuit adhered to its established precedent that an attorney's conduct or misconduct is imputed to his or her client "in *any* context." *United States v. DiMucci*, 879 F.2d 1488, 1496 (7th Cir. 1989)(emphasis in original). In reaching this result, the Seventh Circuit relied upon this Court's well established precedent that a client may not avoid the consequences of the acts or omissions of its attorney. *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962). Further, in the almost fifty years since *Link* was decided, this Court has reaffirmed this principle on several occasions. *United States v. Boyle*, 469 U.S. 241, 250 (1985); *Pioneer Investment Services Co.*, 507 U.S. at 396-397. Moreover, Petitioner makes no claim that a circuit split exists or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory

power. Accordingly, Petitioner has failed to present a compelling reason for this Court to grant *certiorari* in this case.

Following counsel for Petitioner's repeated failures to litigate this matter in a manner consistent with the Federal Rules of Civil Procedure and the prior orders of the District Court, Traditional Baking brought a motion to strike Petitioner's pleadings and for default judgment pursuant to Fed. R. Civ. P. 37(b)(2). The District Court ultimately granted Traditional Baking's motion, but only after it afforded Petitioner and its prior counsel ample opportunity to avoid such a drastic result. The propriety of this Order has never been questioned, and is entirely consistent with the established precedent of this Court. *National Hockey League*, 427 U.S. at 642. Traditional Baking then obtained a default judgment, which Petitioner subsequently moved to vacate pursuant to Rule 60(b). Petitioner did not appeal the underlying default judgment, although it did appeal the District Court's denial of its Rule 60(b) motion. However, an appeal from a denial of Rule 60(b) relief does not bring up for review the underlying judgment, and is limited to the question of whether the District Court abused its discretion in denying the motion. *Browder*, 434 U.S. at 263 n.7.

In its decisions considering motions for relief under Rule 60(b)(6), this Court has endorsed a strict interpretation of the Rule and required movants to show "extraordinary circumstances" in order to justify reopening a final judgment. *Gonzalez*, 545 U.S. at 535. This Court's first decision to consider Rule 60(b)(6) was in *Klapprott v. United States*, 335 U.S. 601 (1948). In

that case, the petitioner sought relief under Rule 60(b)(6) from a default judgment stripping him of his citizenship, where his default was precipitated by the fact that he had been imprisoned by the United States, weakened from illness and fighting grave criminal charges, where he was unrepresented by counsel in the denaturalization proceedings and lacked the funds to hire one. 335 U.S. at 611. This Court determined that, in light of the aforementioned circumstances and the "extraordinarily severe penalty" of the loss of American citizenship, the facts of the case justified relief under the Rule. 335 U.S. at 612, 614. However, just two years later, *Klapprott* was distinguished by this Court as "a case of extraordinary circumstances" when this Court affirmed the denial of Rule 60(b)(6) relief, where the petitioners (who similarly sought to vacate judgments canceling their certificates of citizenship) among other things, were not ill, imprisoned or penniless, and they had the benefit of counsel of their choosing. *Ackerman v. United States*, 340 U.S. 193, 199-200 (1950). The "extraordinary circumstances" standard has been employed by this Court whenever it considers Rule 60(b)(6). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 857, 863 and n.11 (1988)("extraordinary circumstances" found justifying relief where the district judge inexcusably failed to recuse himself pursuant to 28 U.S.C. §455(a)); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)(a change in the law regarding tolling period for statute of limitations did not constitute "extraordinary circumstances" justifying relief for inmate serving 99-year sentence).

In its Opinion, the Seventh Circuit determined that the District Court did not abuse its discretion when it

denied Petitioner's Rule 60(b) motion. Consistent with this Court's precedent, the Seventh Circuit considered whether "extraordinary circumstances" existed that would justify relief under Rule 60(b)(6). It concluded that attorney misconduct does not present an extraordinary circumstance. Unfortunately, allegations of attorney negligence or misconduct have become commonplace, and a review of decisions from the Seventh Circuit alone confirms this fact. *Sparrow v. Heller*, 116 F.3d 204, 206 (7th Cir. 1997)(inexcusable neglect is not a basis for relief under Rule 60(b)(6)); *United States v. 8136 S. Dobson St.*, 125 F.3d 1076, 1084 (7th Cir. 1997)(Rule 60(b) relief was not available, where even the intentional misconduct of attorney would be attributed to client); *Easley v. Kirmsee*, 382 F.3d 693, 699 n.5 (7th Cir. 2004)(Rule 60(b)(6) relief is unavailable when attorney negligence is at issue); *Dickerson v. Bd. of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1118 (7th Cir. 1994)("Indeed, this court has recently held that counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief"); *United States v. 7108 West Grand Ave.*, 15 F.3d 632, 634 (7th Cir. 1994)("The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds"); *Chicago Downs Association, Inc. v. Chase*, 944 F.2d 366, 370-1 (7th Cir. 1991)(rejecting argument that counsel's gross negligence should not be attributed to the client); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986)(argument that attorney was "asleep on the job" did not justify Rule 60(b) relief because "a litigant is bound by his lawyer's acts").

Of course, the Seventh Circuit's Opinion is consistent with this Court's longstanding policy, as expressed in *Link:*

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on his client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962), quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1880). Further, this Court noted that any other rule would work an injustice inasmuch as it would visit the sins of the plaintiff's lawyer upon the defendant. *Id.* at n. 10. Indeed, Justice Black in dissent well understood the rule laid down in *Link*: clients must always suffer for the mistakes of their lawyers. *Id.* at 648. Accordingly, *Link* is virtually indistinguishable from the Seventh Circuit's decision in *United States v. DiMucci*, which holds the client responsible for its attorney's conduct in any context. 879 F.2d at 1496.

Nor has this Court retreated from *Link* in the decades since it was decided. As noted previously, in

National Hockey League, this Court affirmed a dismissal entered as a sanction under Rule 37 as a result of counsel's wilful misconduct in connection with their responsibilities in discovery. 427 U.S. at 643. In *United States v. Boyle*, 469 U.S. 241, 242 (1985), this Court held the client responsible for his attorney's misconduct, notwithstanding assertions that the attorney misled the client. In that case, the executor of a will retained an attorney to handle the estate, provided his attorney with all relevant information and records for the purposes of filing a federal estate tax return, and repeatedly asked the attorney about the proceedings and the preparation of the tax return. *Id.* The attorney advised that the tax return would be filed in a timely manner. *Id.* at 243. The return ultimately was filed three months late, and the IRS assessed penalties and interest against the executor pursuant to statute. *Id.* at 243. The executor paid the penalty, and brought suit seeking a refund, alleging his failure to file the return on time was "due to reasonable cause," (an exception to the penalty statute) *e.g.*, his reliance upon his attorney. *Id.* at 244 The district court granted the refund, and a divided Seventh Circuit affirmed, issuing three opinions. *Id.* On grant of *certiorari*, this Court unanimously reversed and held that the executor was responsible for the omissions of his attorney. *Id.* at 251-252.[2] Thereafter, in *Pioneer Investment Services Co.*, the Court affirmed the Sixth

2. In his concurring opinion in the Seventh Circuit, Judge Coffey made the argument Petitioner makes here, that the misdeeds of the lawyer (which Judge Coffey characterized as "inefficiency, negligence, carelessness and misleading conduct") should not be imputed to the client. *Boyle v United States*, 710 F.2d 1251, 1255-56 (7th Cir. 1983). As noted, this Court unanimously rejected such a theory.

Circuit's determination that an attorney's inadvertent failure to file a proof of claim by the claim bar date could constitute "excusable neglect" for the purposes of Fed. R. Bank. P. 9006(b)(1). 507 U.S. at 397. In so doing, however, all nine justices of the Court once again reaffirmed *Link* and found that any attempt by the circuit court to shield a party from the consequences of its attorney's conduct constituted error. *Id.* at 396-397, 405-406.

Seeking to avoid the great weight of authority that ultimately dooms its claims, Petitioner relies primarily upon a district court decision, *In Re Robenson*, 124 B.R. 757 (N.D. Ill. 1991), which dealt with an appeal from several bankruptcy court orders. The district court granted relief from judgment pursuant to Rule 60(b)(6) on the grounds of "unconscionable" attorney neglect. 124 B.R. at 759. However, a district court decision does not have *stare decisis* effect; it is not a precedent. *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005). Moreover, as noted by the Seventh Circuit in its Opinion in this case, the reasoning of *In Re Robenson* was repudiated over 15 years ago in *7108 West Grand Ave.*, 15 F.3d at 634. Petitioner also cites, in passing, *Boughner v. Secretary of Health, Education & Welfare*, 572 F.2d 976 (3d Cir. 1978), and *Jackson v. The Washington Monthly, Co.*, 569 F.2d 119 (D.C. Cir. 1977), as cases that stand with *Robenson* for the proposition that attorney neglect may be a basis for relief under Rule 60(b)(6). However, each of these cases predates this Court's unanimous reaffirmance of *Link* in *Pioneer*. Moreover, each of these cases is distinguishable on their facts. In *Boughner*, it was determined that the attorney in question effectively

abandoned 52 separate clients, and the six movants in that case actually raised their Rule 60(b)(6) arguments in the district court, and did not wait to raise them for the first time on appeal as Petitioner did here. *Boughner*, 572 F.2d at 977. In *Jackson*, the circuit court noted that, unlike *Link* and the District Court's Order in this case, the record did not reveal a course of protracted neglect. *Jackson*, 569 F.2d at 121.

This Court's precedent is clear that Petitioner's appropriate remedy for its attorney's alleged neglect is not relief against Traditional Baking under Rule 60(b), but rather a suit for malpractice against that attorney. *Link v. Wabash Railroad Co.*, 370 U.S. at 634, n.10 ("[I]f the attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice"). Such a rule is consistent with the decision of the Seventh Circuit in this case and the authorities it relied upon as well. See *7108 West Grand Ave.*, 15 F.3d at 633 ("Malpractice, gross or otherwise, may be a good reason to recover from the lawyer, but does not justify prolonging litigation against the original adversary").

Petitioner's ultimate argument–that it should not be penalized for the omissions of its own attorney–ignores the well-established authority of this Court and, contrary to law, would have the Court visit the alleged sins of Petitioner's attorney upon Traditional Baking – the only innocent party in this litigation. The federal courts are understandably reluctant to endorse such a perverse result. *Link*, 370 U.S. at 634 n. 10.; *Easley*, 382 F.3d at 699 n.6 (if a party's attorney was negligent, the party should not be permitted to shift the burden

of its agent's neglect onto either its opponent or the district court). This Court should reject Petitioner's arguments and deny the Petition for Writ of *Certiorari*.

As outlined above, the Seventh Circuit's Opinion affirming the District Court is entirely consistent with the previous decisions of this Court that a party must always be held accountable for the acts or omissions of its attorney. Moreover, since Petitioner does not assert that a circuit split exists or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power, Petitioner has failed to present a compelling reason for this Court to grant *certiorari* in this case. Accordingly, the Petition for Writ of *Certiorari* should be denied.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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